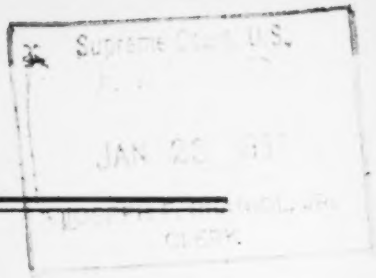
86 - 1239



No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF MARIPOSA and RODERIC B. SINCLAIR,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:
JOHN J. HOLLENBACK JR.
STRAUSS NEIBAUER ANDERSON & HOLLENBACK
620 12th Street
Modesto, California 95354
(209) 526-2211

GARY V. DIXON
BARBARA E. ETKIND
ROSS DIXON, & MASBACK
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 828-4800

CHARLES K. BRUNN
BRUNN THAYER & FLYNN
928 12th Street
Modesto, California 95353
(209) 521-2133
Counsel of Record

PHILIP W. HARVEY
BRUNN THAYER & FLYNN
928 12th Street
Modesto, California 95353
(209) 521-2133
Counsel for Petitioner

IN THE

Supreme Court of The United States

No._____

COUNTY OF MARIPOSA AND RODERIC SINCLAIR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

The CLERK is hereby requested to enter my appearance as Counsel of Record for the COUNTY OF MARIPOSA and RODERIC B. SINCLAIR, who IN THIS COURT are Petitioners.

I certify that I am a member of the Bar of the Supreme Court of the United States.

BRUNN, THAYER & FLYNN

By_____
CHARLES K. BRUNN

MR. CHARLES K. BRUNN
BRUNN, THAYER & FLYNN
928 Twelfth Street
Post Office Box 3366
Modesto, California 95353
Telephone No. (209) 521-2133

QUESTION PRESENTED

Whether an "exclusive remedy" provision contained in a state workers' compensation statute precludes third party actions for indemnity against the federal government, which does not contribute to or participate in the state system and whose employees are not compensated under it; or whether the government's amenability to such suits is governed by the Federal Employees' Compensation Act, which, as this Court held in *Lockheed Aircraft Corporation* v. *United States*, 460 U.S. 190 (1983), contains no such bar.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement	2
Reasons For Granting The Petition	5
Conclusion	16
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1
Appendix E	E-1
Appendix F	F-1

TABLE OF AUTHORITIES

CASES	PAGE
American Motorcycle Association v. *Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal.Rptr. 182 (1978)	10
Arcell v. *Ashland Chemical Co.*, 152 N.J. Super. 471, 378 A.2d 53 (1977)	7
Desert Steel Co. v. *Superior Ct.*, 22 Ariz. App. 279, 526 P.2d 1077 (1974)	7
Gernand v. *Ost Services, Inc.*, 298 N.W.2d 500 (N.D. 1980)	7
Georgia Power Co. v. *Diamond*, 130 Ga. App. 268, 202 S.E.2d 704 (1973)	6
Halstead v. *Norfolk & Western Railway Co.*, 236 F. Supp. 182 (D. W.Va. 1964), *aff'd*, 350 F.2d 917 (4th Cir. 1965)	6
Hammond v. *Kolberg Manufacturing Corp.*, 542 F. Supp. 662 (D. Colo. 1982)	6
Harter Concrete Products, Inc. v. *Harris*, 592 P.2d 526 (Okla. 1979)	7
Howard, Needles, Tammen & Bergendoff v. *Steers, Perini & Pomeroy*, 312 A.2d 621 (Del. 1973)	6
In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, Nos. 85-1246, 85-1253, 85-1288 (May 19, 1986)	12,13
Iowa Power & Light Co. v. *Abild Construction Co.*, 249 Iowa 314, 144 N.W.2d 303 (1966)	7
Kellen v. *Second Judicial District Court*, 98 Nev. 133, 642 P.2d 600 (1982)	7
Kessler v. *Bowie Machine Works, Inc.*, 501 F.2d 617 (8th Cir. 1974)	6
LeJeune v. *Highlands Insurance Co.*, 287 So.2d 531 (La. Ct. App. 1973)	7
Lockheed Aircraft Corp. v. *United States*, 460 U.S. 190 (1983)	*passim*
McCleskey v. *Noble Corp.*, 2 Kan. App. 2d 240, 577 P.2d 830 (1978)	7
Mulder v. *Acme-Cleveland Corp.*, 95 Wis.2d 173, 290 N.W.2d 276 (1980)	7
Oaklawn Jockey Club, Inc. v. *Pickens-Bond Construction Co.*, 251 Ark. 1100, 477 S.W.2d 477 (1972)	7

CASES	PAGE
Petznick v. *Clark Equipment Co.*, 333 F. Supp. 913 (D. Neb. 1971)	6
Redwing Carriers, Inc. v. *Crown Central Petroleum Corp.*, 356 So.2d 1203 (Ala. 1978)	6
Richards v. *United States*, 369 U.S. 1 (1962)	12
Reilly v. *United States*, 513 F.2d 147 (8th Cir. 1975)	12
Roy v. *Star Chopper Co.*, 584 F.2d 1124 (1st. Cir. 1978)	6
Rucker Co. v. *M&P Drilling Co.*, 653 P.2d 1239 (Okla. 1982)	7
Rupe v. *Durbin Durco, Inc.*, 557 S.W.2d 742 (Tenn. Ct. App. 1976)	7
Sears, Roebuck & Co. v. *International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978)	10
Seattle First Nat'l Bank v. *Shoreline Concrete Co.*, 91 Wash.2d 230, 588 P.2d 1308 (1978)	7
Smith Petroleum Services, Inc. v. *Monsanto Chemical Co.*, 420 F.2d 1103 (5th Cir. 1970)	6
State v. *Wien Air Alaska, Inc.*, 619 P.2d 719 (Alaska 1980)	6
Stevens v. *Polinsky*, 32 Conn. Supp. 96, 341 A.2d 25 (1974)	7
United States v. *Kubrick*, 444 U.S. 119 (1979)	12
United States v. *Muniz*, 374 U.S. 150 (1963)	11
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951)	10
Weyerhaeuser Steamship Co. v. *United States*, 372 U.S. 597 (1963)	8,9, 13,14
Williams v. *Ashland Chemical Co.*, 52 Ohio App. 2d 81, 368 N.E.2d 304 (1976)	7

STATUTES	
Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*	3
5 U.S.C. § 8116(c)	7 8,9
28 U.S.C.	
Section 1346(b)	10
Section 2674	10
Cal. Lab. Code	
Section 3600.5(b)	13, 14,15
Section 3700	12
Section 3864	*passim*

STATUTES	PAGE
N.C. Gen. Stat. § 97-10.2(e) (1979)	6
Ore. Rev. Stat. § 656.018 (Supp. 1983)	6
Pa. Stat. Ann. tit. 77, § 481(b) (Purdon Supp. 1981-1982)	6
Tenn. Code Ann. § 50-6-108 (Supp. 1983)	6
Tex. Rev. Civ. Stat. Ann. art. 8306 (Vernon 1966)	6
MISCELLANEOUS	
H.R. Rep. No. 729, 81st Cong., 1st. Sess. (1949)	9
Larson, Third-Party Actions Over Against Workers' Compensation Employer, 1982 Duke L.J. 483	6,8
S. Rep. No. 836, 81st Cong., 1st Sess. (1949)	9

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF MARIPOSA and RODERIC B. SINCLAIR,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The County of Mariposa and Roderic B. Sinclair petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, B1-B9) is reported at 798 F.2d 364. The order of the court of appeals

denying rehearing (App. A, *infra*, 1a) is not reported. The district court's findings of fact and conclusions of law (App. C, *infra*, C1-C10) are not reported. The opinion of the district court denying the United States' motion to dismiss or, in the alternative, for summary judgment (App. D, *infra*, D1-D8) and the post trial decision and order (App. E, *infra*, E1-E3) and the amended findings of fact and conclusion of law (App. E, *infra* E4-E5) are also not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A petition for rehearing was denied on October 28, 1986 (App. A, *infra*, A1-A2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 8116(c), 28 U.S.C. §§ 1346(b) and 2674, and Cal. Lab. Code §§ 3600.5(b) and 3864 are reproduced in Appendix F, *infra*, F1-F3.

STATEMENT

1. On March 5, 1983, Queen Elizabeth II visited Yosemite National Park in California. The federal government dispatched a team of Secret Service agents into the state for several days to provide protection. This case arises out of an automobile accident in which three of the agents were killed. None of the decedents was a California resident; nor were they regularly assigned to duties or offices in California.

The collision occurred as three cars containing several Secret Service agents were traveling eastbound in caravan fashion on California Route 132. The cars were driven by Agent Phillips, Agent LaBarge, and Agent Carpenter, respectively. App. C, *infra*, C5.

In the area where the accident occurred, Route 132 is a two-lane road. The district court described the portion of Route 132 on which the accident occurred as "a blind curve for both eastbound and westbound traffic. . . ." App. C, *infra,* C6. The district court found that as Agent Phillips' car entered the curve, he "began to drive the vehicle across the center line as he negotiated the curve until approximately one-half of his vehicle was within the westbound lane." *Id.* at C7. Likewise, "[a]s the vehicle driven by LaBarge passed the point approximately where the solid yellow center line ends on State Route 132 at the entrance to the curve, he began to drive his vehicle to the left of the center line until approximately one-half of his vehicle was within the westbound lane." *Id.*

At the same time as the agents were traveling eastbound, Deputy Sheriff Sinclair was traveling westbound on Route 132. As he entered the blind curve from the east, he saw the Phillips and LaBarge cars crossing the center line into his lane. "As a result of seeing both of the above-described vehicles moving partially into his lane of travel, Sinclair applied the brakes of his vehicle causing them to lock." App. C, *infra,* C8. Deputy Sinclair's car skidded into Agent LaBarge's car, killing Agent LaBarge and the two agents traveling with him instantly.

The district court found that Deputy Sinclair's rate of speed was excessive. The court therefore concluded that Deputy Sinclair, as well as Agents LaBarge and Phillips, had acted negligently, and apportioned 70% of the responsibility for the accident to petitioners and 30% to respondent.

2. The survivors of the three agents who were killed in the accident received payments from the federal government under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.* ("FECA"). They also filed wrongful death diversity actions against the County and Deputy Sinclair in the United States District Court for the Eastern District of California. Petitioners, in turn, filed third party claims against the United States and Agent LaBarge's estate. Petitioners claimed that if they were required to pay damages to the agents' survivors, they were entitled to partial indemnity from the United States based on the negligence of its employees.

Respondent moved to dismiss the third party complaints or, in the alternative, for summary judgment. The government relied on California's workers' compensation laws, which generally bar indemnity actions against employers brought by third parties that have been sued by injured employees.[1]

The district court denied the government's motion, holding that the logic of its position "fails to take into account the impact of *Lockheed* [*Aircraft Corp.* v. *United States,* 460 U.S. 190 (1983)]". App. D, *infra,* D6. The court recognized that the government's argument turned on the payments made pursuant to FECA: "[I]t is the payment by the United States to a federal employee under FECA which the United States seeks to analogize to payments under the California Workers' Compensation Act. In other words, it is only by looking to FECA that the United States' position will work because the United States cannot pay into the California workers' compensation system." *Id.* As the district court noted, however, *Lockheed* held "that payments pursuant to FECA do not constitute the exclusive remedy against claims of unrelated third parties." *Id.* The court therefore correctly concluded that "[t]o hold that FECA in this action really means the California Workers' Compensation Act which, as interpreted, would constitute an exclusive remedy against unrelated third party claimants essentially would have the effect of negating the holding of *Lockheed." Id.*

Prior to the trial in this case, petitioners settled the wrongful death claims by the agents' survivors for four million dollars. Following a month-long trial on the third party complaints, the district court concluded that both Deputy Sinclair and Agents Phillips and LaBarge were responsible for the accident. The court ordered the federal government to reimburse petitioners for 30% of the settlement amount, or $1.2 million.

---

[1] Cal. Lab. Code § 3864 provides:

If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

3. The Ninth Circuit reversed. The court of appeals held that while *Lockheed* established that FECA does not directly bar third party suits against the federal government, that decision does "not confer on third-party tortfeasors substantive rights against the United States." (App. B, *infra*. B5) Second, the court held that—"all other things being equal—the United States should be entitled to the same immunity from suit enjoyed by a private employer covered by state workmen's compensation laws." *Id.* at B6. Finally, the court of appeals rejected petitioners' argument that, if California law controls, the proper analogy is not to an employer covered by the California workers' compensation statutes, but rather to an out-of-state employer covered by the other state's workers' compensation law. Petitioners argued that the United States was relegated to the defenses and immunities available under its own workers' compensation law (FECA). Because FECA does not bar third party actions against the government, petitioners argued, they were entitled to indemnity. The court of appeals dismissed petitioners' argument on the ground that it "begins and ends with federal law" (*id.* at B7), *viz.*, FECA, and that FECA provides no underlying substantive right to sue.

REASONS FOR GRANTING THE PETITION

The question presented by this case warrants the Court's plenary review. First, the court of appeals' decision is certain to have widespread application. As discussed below, the federal government functions as an employer throughout the United States, and virtually every state has either a statute like Cal. Lab. Code § 3864 or case law to the same effect. Second, although in *Lockheed* the Court was not required to and did not specifically address the precise question involved here, the decision below makes clear that, absent clarification, the holding of *Lockheed* itself will be nullified. Third, the court of appeals' decision is manifestly incorrect. It seriously misconstrues both FECA and the FTCA, and is entirely at odds with basic workers' compensation law, as incorporated in the federal as well as state systems.

1. The Question Presented Is Of Widespread Importance

The question whether an exclusive remedy provision contained in a *state* workers' compensation law affords the *federal* government immunity from suits for indemnity by third persons is of widespread importance. As the court of appeals acknowledged, the federal government "employs workers in every state, has a presence in every state, and involves itself with the laws of every state." App.B, *infra*, B8. Moreover, a majority of states, like California, bar third party actions for indemnity or contribution against employers who have complied with the applicable workers' compensation law.[2] Final resolution of this case thus will have a profound and nationwide impact on the role of the federal government as an employer and in its relationships with third parties.

---

[2] The workers' compensation statutes in several other states contain "exclusive remedy" provisions similar to Cal. Lab. Code § 3864. *See, e.g.*, N.C. Gen. Stat. § 97-10.2(e) (1979); Pa. Stat. Ann. tit. 77, § 481(b) (Purdon Supp. 1981-1982); Tex. Rev. Civ. Stat. Ann. art. 8306 (Vernon 1966); Ore. Rev. Stat. § 656.018 (Supp. 1983); Tenn. Code Ann. § 50-6-108 (Supp. 1983). In addition, even absent such legislation, "([t]he great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law." Larson, Third-Party Actions Over Against Workers' Compensation Employer, 1982 Duke L.J. 483, 488 (footnote omitted). Likewise, "the great majority of cases hold that, when the relationship between the parties does not spring from a contract or special position such as bailee or lessee, the third party cannot recover indemnity from the employer." *Id.* at 528. The most commonly expressed rationale is that, because the workers' compensation act removes the employer's liability to the employee, there can be no joint liability between the third party and the employer on which to predicate an action for indemnity or contribution. *See, e.g., Roy* v. *Star Chopper Co., Inc.*, 584 F.2d 1124, 1130-1132 (1st. Cir. 1978) (construing Mass. and R.I. law); *Kessler* v. *Bowie Machine Works*, 501 F.2d 617, 622 (8th Cir. 1974) (construing S.D. law); *Smith Petroleum Services, Inc.* v. *Monsanto Chemical Co.*, 420 F.2d 1103, 1111-1112 (5th Cir. 1970) (construing Miss. law); *Hammond* v. *Kolberg Manufacturing Corp.*, 542 F. Supp. 662 (D. Colo. 1982); *Petznick* v. *Clark Equipment Co.*, 333 F. Supp. 913, 914 (D. Neb. 1971); *Halstead* v. *Norfolk & Western Railway Co.*, 236 F. Supp. 182, 189 (D. W.Va. 1964), *aff'd*, 350 F.2d 917 (4th Cir. 1965); *Redwing Carriers, Inc.* v. *Crown Central Petroleum Corp.*, 356 So.2d 1203, 1204 (Ala. 1978); *State* v. *Wien Air Alaska, Inc.*, 619 P.2d 719, 720 (Alaska 1980); *Howard, Needles, Tammen & Bergendoff* v. *Steers, Perini & Pomeroy*, 312 A.2d 621, 623 (Del. 1973); *Georgia Power Co.* v. *Diamond*, 130 Ga. App. 268, 202 S.E.2d 704, 706 (1973); *Iowa Power & Light Co.* v. *Abild Construction Co.*, 249 Iowa 314,

(Footnote continued on following page)

2. The Ruling of the Court of Appeals Effectively Negates This Court's Decision in Lockheed

Guidance by the Court is particularly necessary in this case in order to avoid nullification of the Court's prior decision in *Lockheed, supra.* In *Lockheed,* the Court held "only that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States." 460 U.S. at 199. The Court did not consider whether any other statute precluded recovery against the United States in such circumstances. In particular, *Lockheed* did not expressly consider the question presented here: Whether an exclusive remedy provision contained in a state workers' compensation statute bars third party indemnity actions against the federal government, which does not contribute to or participate in the state system and whose employees cannot receive compensation thereunder.[3]

(Footnote continued from previous page)

144 N.W.2d 303, 310 (1966); *McCleskey* v. *Noble Corp.*, 2 Kan. App. 2d 240(1978); 577 P.2d 830, 835; *LeJeune* v. *Highlands Insurance Co.*, 287 So.2d 531, 533-534 (La. Ct. App. 1973); *Kellen* v. *Second Judicial District Court*, 98 Nev. 133, 642 P.2d 600 (1982); *Arcell* v. *Ashland Chemical Co., Inc.*, 152 N.J. Super. 471, 378 A.2d 53, 62 (1977); *Gernand* v. *Ost Services, Inc.*, 298 N.W.2d 500, 504-505 (N.D. 1980); *Williams* v. *Ashland Chemical Co.*, 52 Ohio App.2d 81, 368 N.E.2d 304, 308-10, 312 (1976); *Rucker Co.* v. *M&P Drilling Co.*, 653 P.2d 1239, 1242 (Okla. 1982); *Harter Concrete Products, Inc.* v. *Harris*, 592 P.2d 526, 528 (Okla. 1979); *Rupe* v. *Durbin Durco, Inc.*, 557 S.W.2d 742, 749-50 (Tenn. Ct. App. 1976); *Seattle First Nat'l Bank* v. *Shoreline Concrete Co.*, 91 Wash.2d 230, 588 P.2d 1308, 1316 (1978); *Mulder* v. *Acme-Cleveland Corp.*, 95 Wis.2d 173, 290 N.W.2d 276, 280-81 (1980). *Cf. Desert Steel Co.* v. *Superior Ct.*, 22 Ariz. App. 279, 526 P.2d 1077, 1079 (1974); *Oaklawn Jockey Club* v. *Pickens-Bond Construction Co.*, 251 Ark. 1100, 477 S.W.2d 477, 478 (1972); *Stevens* v. *Polinsky*, 32 Conn. Supp. 96, 341 A.2d 25, 28-29 (1974). Although the decision below is based on Cal. Lab. Code § 3864, we note that the court of appeals' view that state, rather than federal, law controls the "immunity" question logically would apply to state decisional as well as statutory law.

[3] The Court's reference to "governing substantive law" (460 U.S. at 199) was required by the fact that, as discussed at greater length below, under the Federal Tort Claims Act, state law provides the underlying cause of action. It is highly unlikely, however, that, by this reference, the Court intended to incorporate the exclusive remedy provision contained in Cal. Lab. Code § 3864. In *Lockheed,* the Court apparently was aware that, as noted above, according to the law of most states, third parties are not entitled to recover against employers who had complied with the requirements of the applicable workers' compensation statute. *See* 460 U.S. at 193 n.3, *citing* Larson, Third-

(Footnote continued on following page)

Nevertheless, the court of appeals' decision in this case effectively negates the Court's holding in *Lockheed*. The essence of *Lockheed* is that payments made pursuant to FECA do *not* constitute the exclusive remedy as against claims asserted by third parties. As the Court stated in *Weyerhaeuser Steamship Company v. United States*, 372 U.S. 597, 601 (1963), and reiterated in *Lockheed*, 460 U.S. at 196, "[t]here is no evidence whatever that [the Congress that enacted 5 U.S.C. § 8116(c)] was concerned with the rights of unrelated third parties. . . ."

The linchpin of respondent's position that indemnity is precluded by Cal. Lab. Code § 3864 is the FECA payments made to the agents' survivors. However, Section 3864 has no direct application. It would not even be part of this case except for the analogy that respondent has drawn between FECA and the California workers' compensation system. The federal government thus argues that FECA entitles it to the same immunity against third party suits for indemnity that a private employer enjoys through the state exclusive remedy statute. As the district court recognized, "it is only by looking to FECA that the United States' position will work because the United States cannot pay into the California workers' compensation system." App. D, *infra*, D6.

The position advanced by respondent in this case thus is no different from that which it urged in *Weyerhaeuser* and *Lockheed*—that payments made by the federal government pursuant to FECA immunize it from liability to third parties for indemnity. The Court has rejected this argument on both prior occasions and should not now permit the Ninth Circuit's contrary decision in this case to stand.

3. The Ninth Circuit's Decision is Manifestly Incorrect

The opinion of the court of appeals misinterprets the applicable provisions of FECA, and the FTCA and as well as their relation to California's worker's compensation system.

(Footnote continued from previous page)

Party Actions Over Against Workers' Compensation Employer, 1982 DUKE L.J. 483. If the Court had been of the view that the body of state law described by Larson (*see* note 2, *supra*) protected the federal government from third party actions, there would have been little point to the holding in *Lockheed* that 5 U.S.C. § 8116(c) is no bar to such actions.

a. *The decision below is patently inconsistent with the legislative history of Section 8116(c).*

As originally enacted in 1916, FECA contained no provision stating that it was the federal employee's exclusive remedy against the government. However, because the FTCA had not yet been enacted, sovereign immunity protected the government from tort suits and no other remedy against the government was then available to federal employees. *See* H. R. Rep. No. 729, 81st Cong., 1st. Sess. 14 (1949).

Enactment of the FTCA in 1946 enabled federal employees covered by FECA to sue the government. Because FECA contained no exclusive remedy provision from 1946 through 1949, the government was routinely found liable in tort to employees who also received payments under FECA. Congress enacted Section 8116(c) to "fill [ ]" this "important gap in the present law." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949).

This legislative history establishes that Congress did not incorporate the exclusive liability provisions of state workers' compensation statutes when, in 1946, it rendered the federal government liable under the FTCA "in the same manner and to the same extent" as a private individual "under like circumstances." As Congress was aware, workers' compensation laws, " 'in general, specify that the remedy therein provided shall be the exclusive remedy.' " S. Rep. No. 836 at 23, *quoted in Weyerhaeuser* at 601 n.5. If the federal government had been able to escape liability by reference to state-created exclusivity provisions, it would not have been subject to tort suits by its employees from 1946 until the 1949 amendments to FECA, and there would have been no "important gap" requiring enactment of 5 U.S.C. § 8116(c). Application of Cal. Lab. Code § 3864 here, as the government urges, simply cannot be reconciled with the foregoing legislative history.[4]

---

[4] The Court relied on precisely this history in construing Section 8116(c) in *Weyerhaeuser*, 372 U.S. at 601-602 & n.5, and *Lockheed*, 460 U.S. at 193-195.

b. *Application of the California workers' compensation statute's exclusive remedy provision is also inappropriate under the FTCA.*

Under the FTCA, the federal government may be held liable in tort "in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674. *See also* 28 U.S.C. § 1346(b).

Here, even the court of appeals acknowledged that California law recognizes the substantive cause of action asserted by petitioners in their third party complaints. In *American Motorcycle Association* v. *Superior Court,* 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the California Supreme Court established the common law right of a joint tortfeasor to obtain indemnification or contribution from the other tortfeasors regardless of whether the third party defendant was named in the original plaintiff's complaint. Subsequent decisions have made plain that even a settling joint tortfeasor may pursue its right of equitable indemnity against other joint tortfeasors. *See Sears, Roebuck & Co.* v. *International Harvester Co.,* 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978). Because the cause of action asserted by petitioners—a third party action for indemnity against joint tortfeasors—is available against a private individual under established California law, it also may be asserted against the federal government under the FTCA.

Respondent notes, however, that a private employer in California would be immune from suits for indemnity by third parties under the exclusive remedy provision contained in Cal. Lab. Code § 3864. Relying on the "like circumstances" language in the FTCA, respondent argues that it is entitled to the same immunity from petitioners' third party actions. Respondent's argument seriously misconstrues the FTCA.

This Court has consistently treated the question of immunity to suit under the FTCA as a matter of federal law. At the outset, the Act itself is viewed as a waiver by the United States of the immunity from suit that traditionally is accorded the sovereign. In *United States* v. *Yellow Cab Co.,* 340 U.S. 543 (1951), the Court held, as a matter of *federal* law, that, by enactment of the FTCA, the government waived its immunity

to suit for the particular cause of action asserted by petitioners herein—third party claims for contribution from a joint tortfeasor.

In *United States* v. *Muniz*, 374 U.S. 150 (1963), the Court faced a question similar to that presented here. The issue in *Muniz* was whether the United States is amenable to suit under the FTCA by federal prisoners for alleged negligence of prison guards and other federal employees. The government contended in *Muniz*, analogously to its argument here, that it should not be required to answer to prisoner suits under the FTCA since, under the law in some states, jailers are not liable to their prisoners. The Court unequivocally rejected the government's argument. "[W]e think it improper to limit suits by federal prisoners because of restrictive state rules of immunity. . . . [H]aving decided that discipline in the federal prisons will not be so seriously impaired that all recovery should be denied for negligently inflicted injuries, we should not at the same time make recovery depend upon a State's decision to the contrary." 374 U.S. at 164-165. Likewise, here, having waived its immunity to third party suits for contribution in the FTCA, the government should not be permitted to escape liability in such actions on the basis of a state statute that extends such immunity to private employers.[5]

The defense raised by the federal government in this case is part of a discrete statutory scheme that, until the court of appeals' decision in this case, had no application whatsoever to respondent. At least in these circumstances, where the United States is not even subject to the California workers' compensation statute, that law's exclusive remedy provision should

[5] To be sure, *Muniz* is distinguishable from this case in that the argument that was urged there was that *no* cause of action on behalf of federal prisoners should be recognized because *some* states afford immunity to their prison officials, not whether a particular plaintiff should be deprived of a cause of action because it would not be available under the applicable state law. *Muniz* nevertheless is highly instructive in its emphasis that once a cause of action is established, it should not be cut off by contrary state law.

not be permitted to cut off petitioners' well established third party right of indemnity.[6]

c. *Even if the immunity question typically were governed by state, rather than federal, law, California's exclusive remedy provision is inapplicable in this case because the private employers to which Cal. Lab. Code § 3864 applies and the federal government are by no means "in like circumstances."*

The decision below impermissibly affords the federal government a defense that would *not* be available to a private party in like circumstances.

In order to qualify for the protection afforded by Section 3864, a California employer must "secure the payment of compensation" either by purchasing a policy of insurance or by obtaining a certificate of consent to self-insure from the Director of Industrial Relations. Cal. Lab. Code § 3700. Here, the federal government has not purchased a policy of workers' compensation insurance, obtained a certificate of permissible self-insurance or otherwise complied with the procedures required by Section 3700. Nevertheless, the court of appeals held that, simply by enacting FECA, the United States placed itself in a position comparable to a private employer that fully complied with the California workers' compensation law. Because a private employer that does not satisfy these statutory requirements is not permitted to invoke the exclusive remedy defense of Section 3864, permitting the government to do so in this case affords it an immunity *not* afforded a private individual in like circumstances, in violation of the plain language of the FTCA.[7]

---

[6] There is no bar under the FTCA to looking to state law for the underlying cause of action and to federal law for the rule governing immunity. To the contrary, this Court has referred to the "interstitial character" of the Act. *Richards* v. *United States*, 369 U.S. 1, 7 (1962). Federal law thus often governs issues that are determinative of recovery. *See e.g., United States* v. *Kubrick*, 444 U.S. 111 (1979); *Reilly* v. *United States*, 513 F.2d 147, 148 (8th Cir. 1975) (under FTCA, federal law governs the question of when a cause of action accrues, for statute of limitations purposes).

[7] Significantly, in the only appellate decision cited by the Ninth Circuit on this point, "[a]ll parties agree[d] with the district court" that the federal government should be analogized to a "compensation-paying private . . . employer in Maine." *In re All Maine Asbestos Litigation (PNS Cases)*, 772

(Footnote continued on following page)

The court of appeals' decision not only contravenes the FTCA, it also runs counter to the basic theory underlying all workers' compensation systems. As the Court has explained on at least two occasions, all workers' compensation systems are based on an essential compromise—a "quid pro quo"—between employer and employee. *See Lockheed,* 460 U.S. at 194; *Weyerhaeuser,* 372 U.S. at 601-602 n.5. In exchange for affording the employee "immediate, fixed benefits, regardless of fault and without need for litigation" (460 U.S. at 194), the employer is granted immunity from certain types of potential liability. As the Court held in *Lockheed,* under FECA the protection afforded the federal government is immunity from suit by "employees, their relatives, and people claiming through or on behalf of them." 460 U.S. at 196 (footnote omitted). Under the California statute, the relief afforded the employer is broader, including immunity from actions by third parties as well as from suits by or on behalf of the employees themselves. *See* Cal. Lab. Code § 3864.

The court of appeals' decision in this case destroys these statutory equations. According to the Ninth Circuit, the rights and immunities of the federal government are governed not by the system into which it makes payments, but rather by a system to which it is entirely unrelated. Even apart from the FTCA issues that are implicated by the holding below, the court of appeals' decision flies in the face of settled workers' compensation law principles, as well as the particulars of FECA.

d. *Even if the court of appeals was correct in holding that state law controls the immunity question, it erred in applying Cal. Lab. Code § 3864, which contains the exclusive remedy provi-*

(Footnote continued from previous page)

F.2d 1023, 1027 (1st Cir. 1985), *cert. denied,* Nos. 85-1246, 85-1253, 85-1288 (May 19, 1986). By contrast, petitioners contend that the United States should be viewed as a non-California employer insured under the laws of a jurisdiction other than California.

sion, rather than Cal. Lab. Code § 3600.5, which, in any event, invokes federal law.

In the event reference to state law is appropriate, the correct reference is to Cal. Lab. Code § 3600.5, rather than Section 3864, since (1) the agents were hired by the federal government outside of California, (2) the agents were in California only on a special temporary assignment to protect the Queen during her visit and (3) the federal government has provided workers' compensation insurance coverage pursuant to FECA.

Section 3600.5(b) provides in relevant part:

> Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer i[f] such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state. . . .

As petitioners argued below, under Section 3600.5, the workers' compensation law of the other "state" controls. The other "state," in this case, is the federal government. Accordingly, because FECA provides the employer no immunity from third party suits for indemnity, the federal government is entitled to no such protection in this case.

The court of appeals rejected petitioners' argument on the ground that "nowhere in the chain of reasoning is there a substantive basis for a third-party suit." App. B, *infra,* B8. According to the appellate court, petitioners' argument "begins and ends with federal law, stopping at California law only long enough to be referred back to federal law. . . . And although the FECA *permits* a third-party suit, it does not, as the Supreme Court made clear in *Lockheed, confer* the underlying substantive right to sue." *Id.* at B8 (emphasis in original). The Ninth Circuit's ruling is demonstrably wrong.

Contrary to the court of appeals' assertion, petitioners' argument "stop[s] at California law" for more than a "refer[ence] back to federal law." California law provides the substantive basis for petitioners' third party action against respondent. Only after incorporating that substantive cause of

action does petitioners' argument refer back to federal law with respect to the immunity issue. According to the plain language of the California statute, that issue is controlled by FECA, which, as this Court held in *Weyerhauser* and *Lockheed,* affords the federal government no immunity from third party suits. Therefore, even assuming state law controls the immunity question, under the applicable California statute respondent would not be entitled to the protection afforded by Cal. Lab. Code § 3864.[8]

Finally, the court of appeals rejected petitioners' argument because the "analogy of the United States to an out-of-state employer is not realistic." App. B, *infra,* B8. Petitioners submit, to the contrary, that the truly fanciful analogy is the one suggested by respondent—between, on the one hand, the federal government, whose employment contract with the agents was made and primarily executed outside California, which makes workers' compensation payments into FECA and whose employees are compensated under FECA and, on the other hand, a purely local California employer that contracts with its employees in California, whose employees generally work in California, that complies with the California workers' compensation system and whose employees are compensated under that system.

As discussed above, under FECA it is clear that the federal government has no immunity from third party suits for indemnity. The Court should not countenance the strained analogy proffered by the federal government in an attempt to take advantage of a more favorable (to it) local rule of law.

---

[8] In the court of appeals, respondent attempted to rely on the following language from Section 3600.5(b) as a bar to recovery against it even under that provision: "The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state." The Ninth Circuit did not adopt this argument. In addition, the reference to "remedy" plainly is to the remedy for the injury or loss sustained by the employee. Finally, we note that, in view of the precise and explicit language by which the California legislature barred third party recovery against employers in Cal. Lab. Code § 3864 (*see* note 1, *supra*), it is highly unlikely that the legislature intended to impose the same bar by the general statement contained in Section 3600.5(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES K. BRUNN, ESQ.
BRUNN, THAYER & FLYNN
928 Twelfth Street
Post Office Box 3366
Modesto, California 95353
(209) 521-2133

January 1987

APPENDIX A

FILED
OCTOBER 28, 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JO ANN LABARGE and BRANDON LABARGE, a minor by and through his Guardian Ad Litem, JO ANN LABARGE,

Plaintiffs,

v.

COUNTY OF MARIPOSA, and RODERIC B. SINCLAIR,

Defendants and Third-Party Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, and ESTATE OF GEORGE PATRICK LABARGE,

Third-Party Defendants-Appellants.

CA No. 85-2300
DC No. CV-F 83-194 REC
(Eastern California)

Before: CHAMBERS, SNEED, and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Farris have

voted to reject the suggestion for a rehearing en banc and Judge Chambers recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

BEST AVAILABLE

APPENDIX B

FILED
AUG 26 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JO ANN LABARGE and BRANDON LABARGE, a minor by and through his Guardian Ad Litem, JO ANN LABARGE. *Plaintiffs,* v. COUNTY OF MARIPOSA, and RODERIC B. SINCLAIR, *Defendants and Third-Party Plaintiffs-Appellees,* v. UNITED STATES OF AMERICA, and ESTATE OF GEORGE PATRICK LABARGE, *Third-Party Defendants-Appellants.*	**CA No. 85-2300** **DC No. CV-F 83-194 REC** **OPINION**

Appeal from the United States District Court for the Eastern District of California, Honorable Robert E. Coyle,

COPY

District Judge, Presiding. Argued & Submitted May 16, 1986, San Francisco, California

Before: CHAMBERS, SNEED, and FARRIS, Circuit Judges.

FARRIS, Circuit Judge:

The United States appeals from a judgment of the district court compelling contribution to the County of Mariposa for thirty percent of the tort settlement paid to the estates of three federal secret service agents who were killed when their automobile collided with a Mariposa County Sheriff's patrol car.

I.

On March 5, 1983 a patrol car driven by Sgt. Roderick Sinclair of the Mariposa County Sheriff's Department collided with a car containing three secret service agents on a winding portion of Route 132. The agents, who were in California on special assignment to protect Queen Elizabeth of Great Britain during her visit to Yosemite National park, died instantly.

The decedents' survivors sued the County of Mariposa and Sgt. Sinclair for negligence and settled their claims for a total of $4 million. The County then commenced this third-party action against the United States. It asserted that the drivers of two federal vehicles—Agent Patrick LaBarge, in the car that was hit, and Agent Max Phillips, in the car travelling ahead of LaBarge's car—had been driving negligently at the time of the accident and thus were at least partly to blame for the resulting loss of life. Relying on a theory of *respondent superior,* the County requested contribution from the federal government.

The third-party suit was tried before the district court. Both sides offered the testimony of percipient witnesses, as well as the expert testimony of accident reconstructionists, photogrammetrists, tire specialists, and human factors specialists. At the close of the evidence, the district court made the following factual findings: (1) the collision occurred on a blind curve; (2) at the time of the accident, Sgt. Sinclair was driving westbound at 64 mph in a 35 mph zone; (3) this speed was 6

mph below the "critical speed" for the curve (the top speed at which a westbound vehicle could negotiate the curve without losing traction or leaving its lane of travel); (3) just prior to the accident, the eastbound vehicles driven by Phillips and LaBarge were both halfway across the center dividing line into the westbound lane; and (4) the presence of the federal vehicles in the westbound lane caused Sgt. Sinclair to slam on the brakes, precipitating the skid that ended in the collision. The district court concluded that Sinclair was 70% at fault and, accordingly, it ordered the United States to indemnify the County of Mariposa for 30% of its settlement—$1.2 million. This appeal followed. We have jurisdiction under 28 U.S.C. § 1291.

II.

A. The United States' Amenability to Suit for Contribution

We review de novo the district court's legal conclusions regarding the United States' amenability to a third-party suit under the Federal Tort Claims Act. *See United States* v. *McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied,* 105 S. Ct. 101 (1984).

As a sovereign, the United States is immune from suit except to the extent that it has unequivocally consented to litigation against itself. *See United States* v. *Orleans,* 425 U.S. 807, 814 (1976). The Federal Tort Claims Act, 28 U.S.C. § 1346(b), §§ 2671-2680 (1982), constitutes a limited waiver of that immunity. For the purposes of this case, the relevant portions of the Act are 28 U.S.C. §§ 1346(b) and 2674. 28 U.S.C. § 1346(b) provides in pertinent part that:

> the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private

> person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 provides in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."

Both provisions direct the courts to analogize the government to a private actor in a similar situation and apply state law to determine amenability to suit and substantive liability.

The United States raises two arguments that California law bars this suit. The first is that California law does not provide for a right of contribution in this case because the original plaintiffs did not secure a joint judgment against the County and the United States. We reject the argument.

In *American Motorcycle Ass'n* v. *Superior Court,* 20 Cal. 3d 578, 599-607, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), the California Supreme Court established the common law right of a joint tortfeasor to obtain indemnification or contribution from the other tortfeasors on a comparative fault basis. The court later emphasized that such an action may be maintained regardless of whether the third-party defendant was named in the original plaintiff's complaint. *People ex rel. Department of Transportation* v. *Superior Court,* 26 Cal. 3d 744, 748, 608 P.2d 673, 163 Cal. Rptr. 585 (1980). Even a settling joint tortfeasor may pursue his right of equitable indemnity against other joint tortfeasors. *See Sears, Roebuck & Co.* v. *International Harvester Co.,* 82 Cal. App. 3d 492, 497, 147 Cal. Rptr. 262 (1978); *Turcon Construction, Inc.* v. *Norton-Villiers, Ltd.,* 139 Cal. App. 3d 280, 283-84, 188 Cal. Rptr. 580 (1983).

The government's second argument is that, in this case, "a private individual under like circumstances" would be a private employer covered by California workmen's compensation law. Since such employers are immune from indemnity suits brought by third-party tortfeasors by virtue of the statute's "exclusive

liability" provision, *see* Cal. Labor Code § 3864 (Deering 1976),[1] the government concludes that it also is immune. *See In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1027-28 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1994 (1986); *General Electric Co.* v. *United States*, 603 F. Supp. 881, 884-87 (D. Md. 1985); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1128 (E.D. Pa. 1984); *In re All Asbestos Cases*, 603 F. Supp. 599, 603 n.3 and n.4 (D. Haw. 1984).

The County presents three responses. First, it relies on the Supreme Court's decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983). In *Lockheed*, the Court held that the Federal Employees Compensation Act, 5 U.S.C. 8101 et seq. (1982)—the federal equivalent of state workmen's compensation laws—does not directly bar third-party indemnity or contribution suits against the government even though it bars suits against the government by covered employees. The government's position, the County contends, would emasculate this holding: because many states' workmen's compensation laws contain exclusive liability provisions similar to California's, third-party plaintiffs would seldom be able to pursue an indemnity or contribution action against the federal employer.

Lockheed, however, did not confer on third-party tortfeasors substantive rights against the United States. The case held only that the FECA did not modify the Federal Tort Claims Act so as to bar directly third-party suits that the applicable state law would otherwise allow. *See* 460 U.S. at 197-99 & n.8.

Second, the County contends that because the United States has not complied with the terms of California's workmen's compensation law, it is not sufficiently "like" a covered private employer to take advantage of the exclusive liability provision of Cal. Labor Code § 3864. This argument misperceives the operation of the "like circumstances" standard prescribed in 28 U.S.C. § 2674. As the Supreme Court

[1] Section 3864 of the California Labor Code provides:

> If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

emphasized in *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), the statutory language refers not to private persons under "the same circumstances," but to those under *similar* circumstances. *See id.* at 64. Because the federal government could never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy. In view of the fact that the FECA is comparable to state workmen's compensation laws, most courts that have considered the issue since *Lockheed* have held that—all other things being equal—the United States should be entitled to the same immunity from suit enjoyed by a private employer covered by state workmen's compensation laws. *See In re All Maine Asbestos Litigation,* 772 F.2d 1023; *General Electric,* 603 F. Supp. 881; *In re All Asbestos Cases;* 603 F. Supp. 599, 607-08; *Colombo* v. *Johns-Manville Corp.,* 601 F. Supp. 1119; *Giannuzzi* v. *Doninger Metal Products,* 585 F. Supp. 1306 (W.D. Pa. 1984).

The County's third response relies on the fact that the secret service agents who were killed were nonresident employees on temporary assignment in California. The County contends that, in this case the United States is best analogized not to an employer covered by the California workmen's compensation law, but to an out-of-state employer covered by that state's workmen's compensation law. Section 3600.5(b) of the California Labor Code provides:

> Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer [if] such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state . . . . The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

Cal. Labor Code § 3600.5(b) (Deering 1976). The United States is thus more like an out-of-state employer whose own laws apply than an in-state California employer. Because the federal workmen's compensation scheme is FECA, and because under *Lockheed* FECA does not bar third-party suits, the County argues that its suit against the United States is permissible under the FTCA.

Structurally, the County's argument begins with the FTCA, which incorporates California law. Looking to California law, however, requires viewing the United States as an out-of-state employer whose own laws apply. The argument thus begins and ends with federal law, stopping at California law only long enough to be referred back to federal law. For the sake of clarity, it might be useful to recapitulate the argument:

(1) In *Lockheed,* the Supreme Court held that the FECA does not directly bar third-party contribution actions against the federal employer.

(2) The Court emphasized that a third-party tortfeasor's substantive right to recovery depends on the Federal Tort Claims Act, which provides that the United States shall be liable in tort under state law to the same extent as a private person in like circumstances.

(3) Under California law, a private person in circumstances like those of the United States is an out-of-state employer of non-resident employees who are injured while temporarily within the state. Such employers are not subject to California workmen's compensation law, so long as the employer is covered by the workmen's compensation laws of his own "state." The workmen's compensation laws of the deceased employees' "own state," (i.e., the United States government) is FECA.

(4) California law provides that the or [sic] remedies under the out-of-state workmen's compensation law shall be the exclusive remedy against the out-of-state employer for any injury received by the nonresident employee while working in California.

(5) The FECA—the relevant out-of-state workmen's compensation law—does not bar a third-party suit. Therefore, the County may sue the United States.

There are two problems with this argument. First, nowhere in the chain of reasoning is there a substantive basis for a third-party suit. The FTCA invokes California law which in turn invokes the law of the out-of-state employer. Yet the law of the out-of-state employer (i.e., the United States) is devoid of substantive law beyond the FECA. And although the FECA *permits* a third-party suit, it does not, as the Supreme Court made clear in *Lockheed, confer* the underlying substantive right to sue. The underlying substantive third-party right to sue must exist independently of the FECA's passive allowance of the exercise of that right. Thus the defect in the County's argument is that, although the FECA does not bar a third-party claim, there is a vacuum as to the substantive law which would give rise to the claim.

This vacuum would not exist as to a private employer who is an out-of-state employer, for its own state law would provide both the substantive right to the claim against third parties as well as the determination whether or not such suits are barred by that state's workmen's compensation laws. In the case of the United States, however, only the latter, in the form of FECA and the *Lockheed* case construing it, exists at all.

The second reason for rejecting the County's argument is that its analogy of the United States to an out-of-state employer is not realistic. The United States, *qua* employer, is not like the private employer doing business outside California who happens to have brought in a few employees for a temporary job in-state. The United States is much more like a national corporation doing business in all the states. It employs workers in every state, has a presence in every state, and involves itself with the laws of every state. It is fiction to regard the activities of such an employee as stopping at the borders of a particular state and to base that on the injured worker's permanent duty station.

In this case, the workers were in California, the accident happened in California, and the federal government is an employer in California. The fact that some of the injured employees were stationed out of state does not withdraw the United States from its presence in California.

We recognize the equities of this case and the arguable unfairness of requiring the County to pay for the United States' negligence.[2] The County argues that it has not benefitted from the *quid pro quo* of the workmen's compensation scheme, whereby the employer accepts strict liability in return for a limitation on that liability. But California bars such claims, and the County, *qua* employer, benefits from both the *quid pro quo* with its workers as well as the bar on potential third-party suits against itself.

We hold that under the FTCA, a "private individual in like circumstances" as those of the United States would be an in-state employer who had brought in some employees for a temporary job in-state. Under California law, a tortfeasor may sue for contribution from a joint tortfeasor, as the County has done, yet California law bars such suits when the third-party defendant is an employer subject to the workmen's compensation laws. It was error to allow the County action against the United States. Because the United States is immune from suit, the court lacked jurisdiction. We need not reach the remaining issues on appeal.

REVERSED.

---

[2] We are puzzled by the district court's inclusion of LaBarge in its calculation of the comparative negligence of the United States. The negligence of the United States is derivative of that of its employees. Because the County settled with LaBarge's survivors, that settlement gave the County its "recovery" for LaBarge's negligence, and the County cannot recover from the master what it already settled with the servant. The County may, of course, attempt to recover for the comparative negligence of Phillips.

APPENDIX C

FILED
MARCH 13, 1985
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JO ANN LABARGE AND BRANDON LABARGE, a minor by and through his Guardian Ad Litem, JO ANN LABARGE,

Plaintiffs,

v.

COUNTY OF MARIPOSA, RODERIC B. SINCLAIR, an individual, and DOES I through XX, Inclusive,

Defendant and Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA, ESTATE OF GEORGE PATRICK LABARGE AND DOES XXI through L, Inclusive,

Third-Party Defendants.

NO. CV-F-83-194 REC
CV-F-83-202 REC
CV-F-83-315 REC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action for indemnity[1] came on regularly for a court trial on the 28th day of November, 1984 before the Honorable Robert E. Coyle, Judge of the United States District

[1] Third party defendant argues that this is not a case for indemnification but one of contribution. *American Motorcycle* v. *Superior Court*, 20 C.3d 578

(Footnote continued on following page)

Court for the Eastern District of California. Trial continued from day to day until it was completed on the 28th day of December, 1984. The third party plaintiffs, the County of Mariposa and Roderic Sinclair appeared through their attorneys Brunn & Thayer, a professional corporation, by Charles K. Brunn, Esq. and Philip W. Harvey, Esq. The third party defendants, the United States of America, appeared through its attorney Donald B. Ayers, Esq., United States Attorney by James E. White, Esq., Chief Assistant United States Attorney, and Steven Lapham, Esq., Assistant United States Attorney. Oral, documentary and demonstrative evidence were introduced.

This being an action for equitable indemnity and the court, having heard the oral testimony, examined the documentary and demonstrative evidence introduced, heard the arguments of counsel, having received and considered written memoranda of the parties submitted from time to time on various issues, the cause having been submitted for decision, and being fully advised in the matter, makes the findings of fact and conclusions of law and enters the orders set forth herein.

FINDINGS OF FACT

1. A motor vehicle accident occurred on March 5, 1983, at approximately 10:30 a.m. on State Route 132 in Mariposa County, State of California. This accident occurred approximately 620 feet east of the intersection of Jalapa Way and State Route 132.

2. At the time of the accident, Sergeant Roderic B. Sinclair, Deputy Sheriff for the County of Mariposa, (hereinafter referred to as Sinclair) was driving westbound on State

---

(Footnote continued from previous page)

has identified the right of a joint tortfeasor to obtain indemnification from the remaining tortfeasors on a comparative fault basis. Whether the description of the right is one of comparative indemnity, partial equitable indemnity or contribution should not effect the outcome of a case in which the issues have been defined from the outset. Therefore, the court grants third party plaintiff's motion to assert [*sic*] the word "contribution" into its third party complaint at each point where the word "indemnity" appears and the third party complaint is deemed so amended.

Route 132 in a 1978 Chevrolet Impala four-door white sedan, bearing license number E730942.

3. At the time of the accident, Reserve Deputy Sheriff for the County of Mariposa, Roderic McKean, (hereinafter referred to as McKean) was a passenger in the vehicle being driven by Roderic B. Sinclair.

4. At the time of the accident, Sinclair and McKean were in the course and scope of their employment for the County of Mariposa.

5. Just prior to the accident, three cars containing Secret Service Agents were traveling in close proximity eastbound on State Route 132 between the intersection of State Route 132 and Hidalgo, which is west of the accident site and the intersection of Jalapa and State Route 132, which is east of the accident site.

6. The first of these vehicles was a 1980 Dodge St. Regis brown four-door sedan bearing California license number 745 ZDW and was being driven by Secret Service Agent Max Phillips (hereinafter referred to as Phillips). Secret Service Agents Albert Weyland, Richard Norton and Frank Donzanti were passengers in this vehicle.

7. The second vehicle was a 1982 blue Dodge Aries with California license number 1CUM251 driven by Secret Service Agent George P. LaBarge (hereinafter referred to as La Barge). Secret Service Agents Donald A. Bejcek and Donald W. Robinson were passengers in this vehicle.

8. The third vehicle was a 1981 Mercury Zephyr, four-door sedan, maroon and silver in color, bearing a California license number 1BFR600 driven by Secret Service Agent David Carpenter (hereinafter referred to as Carpenter). Secret Service Agents Robert Wanko and John Orizzi were passengers in this vehicle.

9. At the time of the accident, all of the Secret Service agents were acting within the course and scope of their employment for the United States of America. The actions of Phillips and LaBarge are imputed to their principal, the United States of America.

10. A first collision occurred on State Route 132 between the vehicle being driven by Sinclair and the vehicle being driven by LaBarge. A second collision following the first occurred between the vehicle driven by Sinclair and the vehicle being driven by Carpenter.

11. Both of the above-described collisions occurred on State Route 132 between the intersection of State Route 132 and Jalapa and the intersection of State Route 132 and Hidalgo approximately 620 feet east of Jalapa Way in the County of Mariposa, State of California.

12. As a result of the accident and the collision between the vehicle being driven by Sinclair and the vehicle being driven by LaBarge, LaBarge, Donald A. Bejcek and Donald W. Robinson died instantly.

13. In the area where the accident occurred, the roadway is a two-lane roadway with one lane for traffic traveling generally eastbound and one lane for traffic traveling generally westbound.

14. In the area where the accident occurred, the eastbound lane and the westbound lane are each approximately 12 feet wide.

15. In the area where the accident occurred, State Route 132 curves in such a manner that the curve is best described as a blind curve for both eastbound and westbound traffic in that drivers traveling eastbound and entering the curve cannot see westbound vehicles approaching from the east as they enter the curve. Conversely, the drivers traveling westbound and entering the curve cannot see the eastbound vehicles approaching from the west as they enter the curve.

16. State Route 132, in the area where the accident occurred, curves to the right for westbound vehicular traffic.

17. At the time of the accident in question, the sky was overcast, the roadway surface, in the area where the accident occurred, was damp and immediately prior to the accident, there had been mist to light rain.

18. For at least seven miles prior to the accident, and up to and until the vehicles reached the point of the accident, there was an approximate distance of three to five car lengths between the rear of the vehicle driven by Phillips and the front of the vehicle driven by LaBarge, and approximately three to five car lengths between the rear of the vehicle driven by LaBarge and the front of the vehicle driven by Carpenter.

19. The three vehicles being driven by the Secret Service agents eastbound on State Route 132 prior to the accident in question maintained the above-described distances between the vehicles from the time the vehicles passed Jalapa, traveling eastbound on State Route 132, until the collision occurred between the vehicle being driven westbound on State Route 132 by Sinclair and the vehicle being driven eastbound on State Route 132 by LaBarge.

20. Between the point where the vehicles being driven by the Secret Service agents passed the intersection of State Route 132 and Jalapa, until the point where the accident occurred, the vehicles were traveling at an approximate speed of 35 miles per hour.

21. As the vehicle being driven by Phillips passed the point on State Route 132 at the commencement of the above-described curve, the point being approximately where the solid yellow center line ends on State Route 132 at the west entrance to the curve, he began to drive the vehicle across the center line as he negotiated the curve until approximately one-half of his vehicle was within the westbound lane.

22. As the vehicle driven by LaBarge passed the point approximately where the solid yellow center line ends on State Route 132 at the entrance to the curve, he began to drive his vehicle to the left of the center line until approximately one-half of his vehicle was within the westbound lane.

23. The operation of the vehicles being driven by Agents Phillips and LaBarge described in Paragraphs 22 and 23 constituted a violation of California Vehicle Code Section 21650 and also constituted a failure to use ordinary and reasonable care under the circumstances.

24. As the vehicles driven by the Secret Service agents started into the above-described curve, Sinclair, driving the Chevrolet, was approaching the curve from an easterly direction and traveling westbound at an approximate speed of 64 miles per hour.

25. The "critical speed" for the above-described curve is 70 miles per hour for westbound vehicles. That is, a vehicle traveling westbound at a speed of 70 miles per hour or less could negotiate the curve, without losing traction, and without leaving its lane of travel.

26. At all times herein mentioned, Sinclair was driving his vehicle at a speed less than the "critical speed" for said curve.

27. As Sinclair was about to enter the above-described curve, he observed that the vehicle being driven by Phillips and then the vehicle being driven by LaBarge were each crossing the center line into his lane of travel with approximately one-half the width of each vehicle being in his lane of travel.

28. As a result of seeing both of the above-described vehicles moving partially into his lane of travel, Sinclair applied the brakes of his vehicle causing them to lock.

29. Upon seeing the vehicle driven by Sinclair, Phillips steered his vehicle back into the eastbound lane with no contact occurring between the two vehicles. The Phillips vehicle was approximately three to five car lengths ahead of the LaBarge vehicle at point of impact between the LaBarge vehicle and the Sinclair vehicle.

30. Upon seeing the westbound vehicle being driven by Sinclair, LaBarge steered his vehicle back into the eastbound lane of State Route 132.

31. As LaBarge steered his vehicle back into the eastbound lane, he also applied his brakes, leaving approximately five feet of locked wheel skid mark. This skid mark was made by the right front wheel of the LaBarge vehicle and commenced in the eastbound lane of State Route 132 and terminated at the approximate point of impact between the vehicle being driven by LaBarge and the vehicle being driven by Sinclair. The location and angle of this locked wheel skid mark confirms that

the LaBarge vehicle was across the center line at the time LaBarge applied his brakes.

32. The vehicle being driven by Sinclair made approximately 67 feet of locked wheel skid marks from the two front tires. The locked wheel skid mark from the left front tire commenced approximately three feet to the right of the center line of State Route 132 for westbound traffic. The skid marks made by the vehicle driven by Sinclair continued in a straight line until they crossed the center line of State Route 132 at the approximate apex of the curve and then continued for approximately 20 feet to the point of impact between the vehicle being driven by LaBarge and the vehicle being driven by Sinclair.[2]

33. The operation of the Chevrolet by Sinclair at the time and place of the accident hereinabove described at the above described speed was negligent. Sinclair's negligence was also a proximate cause of the accident.

34. The total negligence which was a proximate and legal cause of the accident is apportioned at 30% to Phillips, LaBarge and the United States of America and 70% to Sinclair and The County of Mariposa.

35. Wrongful death actions were filed in this court on behalf of the survivors of Bejcek, on behalf of the survivors of Robinson, and on behalf of the survivors of LaBarge. These actions were entitled as follows:

a. JoAnn LaBarge, et al., vs. The County of Mariposa, et al., Case Number CV-F-83-194 REC.

b. Lois Robinson, et al., vs. The County of Mariposa, et al., Case Number CV-F-83-202 REC.

c. Ellen Bejcek, et al., vs. The County of Mariposa, et al., Case Number CV-F-83-315 REC.

---

[2] Testimony presented by the third party defendants by Sgt. Shilly of the California Highway Patrol which would be inconsistent with the court's findings relating to critical speed of the curve in question, speed of the Sinclair vechicle prior to braking, speed of the Sinclair vechicle at point of impact, angle of point of impact, were withdrawn by the third party defendants on the basis of the lack of expertise on behalf of Sgt. Shilly in testifying to such matters.

36. These wrongful death actions were settled prior to commencement of trial in this matter by payment on behalf of the County of Mariposa and Sinclair of the total sum of Four Million Dollars ($4,000,000.00), which total sum was paid in part to the survivors of Bejcek, in part to the survivors of Robinson and in part to the survivors of LaBarge. These payments were in full and final settlement of any and all claims of the above-mentioned survivors, as said claims are more particularly described in the complaints filed by the survivors and in full and final settlement of any and all claims of the United States. The court finds and the parties have agreed that the settlements were fair and reasonable. The complaints filed on behalf of the survivors were dismissed with prejudice on July 10, 1984.

37. The negligent operation of their vehicles by Phillips and LaBarge was a substantial factor, proximate cause and a legal cause in bringing about the accident on March 5, 1983 and the subsequent settlement for Four Million Dollars ($4,000,000.00) paid by Third Party Plaintiffs.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Court makes the following Conclusions of Law:

1. That this court has jurisdiction of the cause of action pursuant to the Federal Tort Claims Act.

2. That Third Party Plaintiffs are entitled to indemnity in this matter pursuant to the authority of *Lockheed* v. *United States,* ____ U.S. ____, 103 S.Ct. 1033 (1983) and the court's findings and conclusions set forth in its order filed herein on the 17th day of May, 1984.

3. That the substantive law of the forum, and the location of the accident, the State of California, is controlling in this matter.

4. That Third Party Plaintiffs herein are entitled, under the laws of California, to recover in this matter pursuant to the rule of partial equitable indemnification as

set forth in the case of *American Motorcycle* v. *Superior Court,* 20 C.3d 578 (1978).

5. That Third Party Plaintiffs are entitled to and shall recover from the defendant, The United States of America, 30% of the total amount of the settlement paid, or the sum of $1,200,000.00.

6. That the sum of $1,200,000.00 is a liquidated sum. Therefore, Third Party Plaintiffs are entitled to interest at the legal rate commencing on July 10, 1984, the date dismissals were filed herein of the complaints filed by the survivors of Bejeck, Robinson and LaBarge.

7. That any of the foregoing conclusions of law deemed to be findings of fact are hereby incorporated into the findings of fact.

LET JUDGMENT BE ENTERED ACCORDINGLY in the principal amount of $1,200,000.00 together with interest at the legal rate commencing on July 10, 1984 and continuing until paid and costs of suit incurred herein in favor of Third Party Plaintiffs, The County of Mariposa and Roderic Sinclair, and against the Defendant, The United States of America.

DATED: March 13, 1985.

ROBERT E. COYLE

ROBERT E. COYLE
United States District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

JO ANN LABARGE, et al., v. COUNTY OF MARIPOSA, et al.,	**EASTERN DISTRICT OF CALIFORNIA AT FRESNO** **CV-F-83-194-REC,** **CV-F-83-202-REC,** **CV-F-83-315-REC**

ROBERT E. COYLE
Name of Judge or Magistrate

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

in the principal amount of $1,200,000.00 together with interest at the legal rate commencing on July 10, 1984 and continuing until paid and costs of suit incurred herein in favor of Third Party Plaintiffs, The County of Mariposa and Roderic Sinclair, and against the Defendant, The United States of America.

Date: March 13, 1985

J. R. GRINDSTAFF
Clerk

by R. MERIGION
Deputy Clerk

APPENDIX D

FILED
MAY 17, 1984
CLERK U.S. DISTRICT COURT
COUNTY DISTRICT OF CALIFORNIA

Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JO ANN LABARGE and BRANDON PATRICK LABARGE, a minor by and through his Guardian Ad Litem, JO ANN LABARGE,

Plaintiffs,

v.

COUNTY OF MARIPOSA, RODERIC B. SINCLAIR, et al.,

Defendants and Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA, ESTATE OF GEORGE PATRICK LABARGE, et al.,

Third Party Defendants.

NO. CV-F-83-194 REC

DECISION AND ORDER

The United States' Third Party Defendant Motion to Dismiss, or in the alternative, for Summary Judgment, was taken under submission following oral argument. Upon due

consideration of the written and oral arguments by the parties, the court enters its order denying the United States' motion for the reasons set forth therein.

Defendant and Third Party Plaintiff County of Mariposa filed Third Party Complaints against the United States in each of these consolidated cases. Roderic B. Sinclair also was named as a third party plaintiff in two of these consolidated cases. The Third Party Complaints allege that George Patrick LaBarge was driving the Secret Service vehicle as the agent and employee of the United States and that LaBarge was driving the vehicle negligently, proximately causing the accident. Therefore, the County of Mariposa alleges that if it is required to pay any judgment, it has a right of contribution against LaBarge and the United States because of their negligence. The answer of the United States alleges as affirmative defenses:

* * *

> 2. The Third Party Complaint fails to state a cause of action against [the] United States of America based upon contribution among alleged joint tortfeasors because of Section 7(b) of the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8116(c).
>
> 3. The Third Party Complaint fails to state a cause of action against [the] United States of America because of the limited waiver of sovereign immunity provided by Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 and the applicable provisions of California law.
>
> A. *28 U.S.C. § 2675(a).*

The United States' initial argument for dismissal is the failure to allege the jurisdictional basis in the Third Party Complaint. Recognizing that this alleged defect may be corrected by amendment, the United States surmises that the only jurisdictional basis for a cause of action arising out of the circumstances of these cases in [*sic*] the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671, *et seq.* The United States then contends that the failure of the County of Mariposa and Roderic Sinclair to comply with the statutory prerequisites to

the filing of a complaint against the United States set forth in 28 U.S.C. § 2675(a) requires dismissal of the Third Party Complaint.

28 U.S.C. § 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. *The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.* [emphasis added]

The government cites *Johns-Manville Sales Corp.* v. *United States,* 690 F.2d 721 (9th Cir. 1982); *West* v. *United States,* 592 F.2d 487 (8th Cir. 1979); and, *United States* v. *Chatham,* 415 F.Supp. 1214 (N.D.Ga. 1976) as authority establishing that the last sentence of § 2675(a) does not apply to this third party complaint. However, it does not appear that any of these cases have any relevance in this matter. In *Johns-Manville Sales Corp.,* the plaintiff sued the United States "to obtain a determination, at this time, that it is entitled to indemnification under the Federal Tort Claims Act . . . for any judgments that may eventually become final against it, in certain state court actions brought by plaintiffs, not parties to this action, who assert they have suffered damages from exposure to asbestos." The Ninth Circuit affirmed the dismissal for lack of subject matter jurisdiction: "Appellant has sued the United States directly; these are not claims asserted by third party complaint, cross-claim or counterclaim. The claims procedure is thus prerequisite to a proper exercise of district court jurisdiction. 690 F.2d at 722. In *West,* the question resolved by the Eighth

Circuit was whether the *original plaintiffs* in a diversity action in which the United States had been made a third party defendant could assert a claim directly against the United States under the Federal Tort Claims Act without having first filed a timely administrative claim. The Eighth Circuit held that under Rule 14(a), Federal Rules of Civil Procedure, a third party complaint refers only to the claim asserted by the third party plaintiff against the third party defendant. Thus, the original plaintiffs in an action cannot file a third party complaint under the rule and, therefore, the last sentence of § 2675(a) does not apply. 592 F.2d at 490-492. *Chatham* holds that § 2675(a)'s exception of counterclaims from the exhaustion of administrative requirement is applicable only when the counterclaim is compulsory within the meaning of Rule 13(a), Federal Rules of Civil Procedure. Thus, all of these cases are factually dissimilar to this matter. The court cannot fathom how their holdings of [sic] analysis would preclude application of the last sentence or § 2675(a). The rationale for the third party complaint exception is that the third party plaintiff is forced into the action by the plaintiff and thus has no choice but to assert any claims he might have against those who might be responsible for the acts he is charged with in the plaintiff's complaint, *Rosario* v. *American Export-Isbrandtsen Lines, Inc.*, 533 F.2d 1227, 1234 (3d Cir.), *cert. denied,* 429 U.S. 857 (1976); *West* v. *United States, id.* at 491. The County of Mariposa and Sinclair are faced with the same situation here. Because of this conclusion, the government's contention that the Third Party Complaint be dismissed for failure to allege the jurisdictional basis of this action or the facts from which federal jurisdiction may be inferred is without merit. It is apparent that this court has ancillary jurisdiction over these third party claims:

> Under Rule 14 ... in the discretion of the court a defendant in the very action which determines the plaintiff's rights against him may have a determination of any right of his against another which arises out of the same transaction or set of facts which gave rise to the plaintiff's claim. It is the theory of the Rule that the defendant's right against the third party is merely the outgrowth of the

> same aggregate or core of facts which is determinative of the plaintiff's claim. In this view, the court which has jurisdiction over the aggregate of facts which constitute the plaintiff's claim needs no additional ground of jurisdiction to determine the third party claim which comprises the same core of facts. It is, we think, in this sense that the Court is said to have ancillary jurisdiction over the third-party claim. [*Dery* v. *Wyer*, 265 F.2d 804, 807 (2d Cir. 1949).]

Accord, West v. *United States, id.* at 492; *see also United States* v. *United Pacific Ins. Co.*, 472 F.2d 792, 793-794 (9th Cir.), *cert. denied*, 411 U.S. 982 (1973).

B. *5 U.S.C. § 8116(c).*

The United States also argues that 5 U.S.C. § 8116(c) has been construed to bar third-party actions for contribution or indemnity among joint tortfeasors, citing as authority, among other decisions, *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (2d Cir. 1975). However, in *Lockheed Aircraft Corp.* v. *United States*, ____ U.S. ____, 74 L.Ed.2d 911 (1983), the United States Supreme Court held that § 8116(c) does not directly bar a third-party indemnity action against the United States. In so holding, the Supreme Court disapproved the holding in *Galimi*. In its motion, the United States argues that the *Lockheed* decision in no way impinged upon the established law barring third party actions for contributions between joint tortfeasors. However, the court is unable to discern any analytical basis for distinguishing *Lockheed* because contribution as opposed to indemnity is sought against the United States. Section 8116(c) makes no such distinction and the Supreme Court's decision is not grounded upon the basis of the remedy sought against the United States. Rather, the identity of the claimant was the factor upon which the Court was focusing. Accordingly, the court finds that dismissal or summary judgment solely on the basis of § 8116(c) is without merit. ,

C. *Substantive Right to Contribution.*

The United States contends that Third Party Plaintiffs have failed to state a claim against the United States inasmuch as an

employer in California is not obligated to reimburse a third party tortfeasor. The basis for the United States' argument is that the United States is liable under the Federal Tort Claims Act only in the same manner and to the same extent as a private individual under like circumstances under the law of the place where the act or omission occurred. The United States argues thusly: In California, pursuant to the California Workers' Compensation Act, the right to recover workers' compensation is the exclusive remedy against the employer if the conditions of compensation under the Workers' Compensation Act exist. It is undisputed that the decedents died while performing duties in the course of their federal employment and that their heirs received workers' compensation benefits paid by the United States pursuant to the Federal Employees Compensation Act. Therefore, the United States should be entitled to the same defenses as would be available to a private employer in California who had made payments pursuant to the California Workers' Compensation Act.

The court does not disagree with the logic of this position as it pertains to the implementation of the FTCA. However, it fails to take into account the impact of *Lockheed.* In the cases before the court, it is the payments by the United States to a federal employee under FECA which the United States seeks to analogize to payments under the California Workers' Compensation Act. In other words, it is only by looking to FECA that the United States' position will work because the United States cannot pay into the California workers' compensation system. However, *Lockheed* holds that payments pursuant to FECA do not constitute the exclusive remedy against claims of unrelated third parties. In these cases, an unrelated third party is seeking contribution against the United States for the alleged negligence of an employee of the United States occurring during the course of employment. FECA does not bar this claim. To hold that FECA in this action really means the California Workers' Compensation Act which, as interpreted, would constitute an exclusive remedy against unrelated third party claimants essentially would have the effect of negating the holding of *Lockheed.* This conclusion does not mean, however, that Third Party Plaintiff's right of contribution against the

United States is absolute if negligence by LaBarge is established. It only means that the exclusive remedy provisions of the California Workers' Compensation Act are not available to the United States to foreclose contribution.

Accordingly, IT IS ORDERED that the United States motion to dismiss or for summary judgment is denied.

DATED: May 17, 1984.

ROBERT E. COYLE

ROBERT E. COYLE
United States District Judge

CERTIFICATE OF SERVICE

JO ANN LABARGE, et al.,
Plaintiffs,

vs

COUNTY OF MARIPOSA, et al.,
Defendants.

Case No. CV-F-83-194-REC

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California. That on May 18, 1984 I served a copy of the attached

DECISION AND ORDER

by placing said copy in a postage-paid envelope addressed to the persons hereinafter listed, by depositing said envelope in the United States Mail at Fresno, California; or by placing said copy into an inter-office delivery receptacle located in the Clerk's Office.

Served by Mail **Served by Inter-office delivery**

RICHARD M. SANGSTER
SANGSTER & MANNION
Suite 3720
Four Embarcadero
San Francisco, CA 94111

BRUNN, LACEY & THAYER
928 Twelfth Street
P. O. Box 3366
Modesto, CA 95353

APPENDIX E

FILED
MAY 8 1985
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JO ANN LABARGE and BRANDON LABARGE, a minor by and through his Guardian Ad Litem, JO ANN LABARGE,

Plaintiffs,

v.

COUNTY OF MARIPOSA and RODERIC B. SINCLAIR, an individual,

Defendants and Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA and ESTATE OF GEORGE PATRICK LABARGE,

Third-Party Defendants.

NO. CV-F-83-194 REC
CV-F-83-202 REC
CV-F-83-315 REC

DECISION AND ORDER

On April 29, 1985, the court heard Third-Party Defendants' Motion to Alter or Amend Judgment. Upon due consideration of the written and oral arguments of the parties, the court grants in part and denies in part the motion for the reasons set forth herein.

Third-Party Defendants correctly argue that prejudgment interest is not allowable against the United States. In the Findings of Fact and Conclusions of Law filed March 13, 1985, it is stated:

> 6. That the sum of $1,200,000.00 is a liquidated sum. Therefore, Third Party Plaintiffs are entitled to interest at the legal rate commencing on July 10, 1984, the date dismissals were filed herein of the complaints filed by the survivors of Bejeck, Robinson and LaBarge.
>
> * * *
>
> LET JUDGMENT BE ENTERED ACCORDINGLY in the principle amount of $1,200,000.00 together with interest at the legal rate commencing on July 10, 1984 . . . .

However, 28 U.S.C. § 2674 provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Consequently, the court will amend the Findings of Fact and Conclusions of Law to award interest from March 13, 1985.[1]

Third-Party Defendants again raise the argument that this court erroneously interpreted and applied *Lockheed Aircraft Corp.* v. *United States,* 460 U.S. 190 (1983) in denying the motion to dismiss in its Decision and Order filed May 17, 1984. Third-Party Defendants cite two recent district court decisions in an effort to persuade the court that its ruling is incorrect. *Prather* v. *Upjohn Co.,* 585 F.Supp. 112, 113 (N.D.Fla. 1984). *In Re Maine Asbestos Litigation (PSN Cases),* 589 F.Supp. 1571, 1574 (D.Me. 1984). However, the court has reviewed its Decision and Order in conjunction with the cases cited to it and concludes yet again that its decision is correct under the law.

---

[1] The court also will amend the caption of this action to delete the Doe plaintiffs and defendants.

Third-Party Defendants further argue that the third-party complaint fails to allege a jurisdictional basis and is therefore fatally defective. However, this court specifically concluded that jurisdiction was proper under the Federal Tort Claims Act, a conclusion of law taken from the proposed findings and conclusions submitted by third-party defendants. Third-Party Defendants have cited no authority that a third party complaint must be dismissed solely because of the absence of a jurisdictional allegation even though the parties have agreed and the court has correctly concluded that jurisdiction is proper. Therefore this portion of Third-Party Defendants' motion is without merit.

ACCORDINGLY, IT IS ORDERED that the Motion to Amend or Alter Judgment is granted in part and denied in part as set forth herein.[2]

DATED: May 7, 1985.

ROBERT E. COYLE

ROBERT E. COYLE
United States District Judge

[2] Third-Party Defendants also moved to amend the judgment to limit the costs for which they are liable to those costs incurred after settlement of the main action and to further apportion costs according to fault or on a 50/50 basis. At oral argument, the parties agreed to continue resolution of these questions in conjunction with Third-Party Plaintiffs' motion for additional costs set for hearing on May 20, 1985.

FILED
MAY 8, 1985
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JO ANN LABARGE and BRANDON LABARGE, a minor by and through his Guardian Ad Litem, JO ANN LABARGE,

Plaintiffs,

v.

COUNTY OF MARIPOSA and RODERIC B. SINCLAIR, an individual,

Defendants and Third-Party Plaintiffs,

v.

UNITED STATES OF AMERICA and ESTATE OF GEORGE PATRICK LABARGE,

Third-Party Defendants.

NO. CV-F-83-194 REC
CV-F-83-202 REC
CV-F-83-315 REC

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law filed March 13, 1985 are hereby amended to delete Conclusion of Law No. 6 and to amend page 13, lines 1 through 7 to read:

LET JUDGMENT BE ENTERED ACCORDINGLY in the principal amount of $1,200,000.00 together with interest at the legal rate commencing on March 13, 1985 and continuing until paid and costs of suit incurred herein in favor of Third Party Plaintiffs, The County of Mariposa and Roderic Sinclair, and against the Third-party Defendant, The United States of America.

The caption to this action also is amended to delete all references to Doe plaintiffs and defendants and all Doe plaintiffs and defendants are dismissed from this action.

DATED: May 7, 1985.

ROBERT E. COYLE

ROBERT E. COYLE
United States District Judge

APPENDIX F

STATUTES INVOLVED

28 U.S.C. § 1346(b)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

5 U.S.C. § 8116(c)

The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative,

spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

Cal. Lab. Code § 3600.5(b)

Foreign employment; domestic injury. Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state; provided, the extraterritorial provisions of this division are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the workmen's compensation insurance or similar laws of such other state. The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

A certificate from the duly authorized officer of the appeals board or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carries such workmen's compensation insurance.

Cal. Lab. Code § 3864.

If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by

such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

(2)

Supreme Court, U.S.
FILED
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1239

In the Supreme Court of the United States

OCTOBER TERM, 1986

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

All Asbestos Cases, In re, 603 F. Supp. 599 (D. Haw. 1984) 6

All Maine Asbestos Litigation (PNS Cases), In re, 772 F.2d 1023 (1st Cir. 1985), cert. denied, No. 85-1253 (May 19, 1986) 5

Colombo v. *Johns-Manville Corp.*, 601 F. Supp. 1119 (E.D. Pa. 1984) 6

General Electric v. *United States*, 603 F. Supp. 881 (D. Md. 1985), aff'd, No. 86-2041 (4th Cir. Mar. 12, 1987) 6

Giannuzzi v. *Doninger Metal Products*, 585 F. Supp. 1306 (W.D. Pa. 1984) 6

Griffin v. *United States*, 644 F.2d 846 (10th Cir. 1981) 5

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 5

Insurance Company of North America v. *United States*, 643 F. Supp. 465 (M.D. Ga. 1986) 5

Lockheed Aircraft Corp. v. *United States*, 460 U.S. 190 (1983) 3, 4, 7

Roelofs v. *United States*, 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975) 5

Stewart v. *United States*, 716 F.2d 755 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984) 5

Page

Statutes:

Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* 1

5 U.S.C. 8116(c) 6, 7

Federal Tort Claims Act:

28 U.S.C. 1346(b) 2

28 U.S.C. 2674 2

Cal. Labor Code (West 1971):

§ 3600.5(b) 4, 8

§ 3864 ..... 2, 3

Miscellaneous:

H.R. Rep. 729, 81st Cong., 1st Sess. (1949) 6, 7

Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483 6

S. Rep. 836, 81st Cong., 1st Sess. (1949) 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1239

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek contribution from the United States for a portion of the tort damages they paid to the estates of three federal employees who were killed in an automobile accident, even though petitioners could not obtain contribution from a private employer under similar circumstances.

1. Three federal Secret Service agents died, while acting within the scope of their employment, when their automobile collided with an automobile driven by Deputy Sheriff Sinclair of the County of Mariposa in California on March 5, 1983. The survivors of the Secret Service agents received payments from the federal government under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et*

BEST AVA

seq. They also sued petitioners—Sinclair and the County of Mariposa—seeking damages for the wrongful deaths. Petitioners then filed claims against the United States for contribution and indemnity, contending that the collision was in part caused by the negligence of the deceased driver and the negligence of another federal employee driving a third car that was not involved in the collision. The estates of the deceased federal employees subsequently settled all claims with petitioners for $4 million. Pet. App. B2.

Following the settlement, petitioners proceeded with their third-party claim against the United States. Under the Federal Tort Claims Act (FTCA), the federal government is liable "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)), so that its liability is the same as that of "a private individual under like circumstances" (28 U.S.C. 2674).[1] The district court did not dispute that the United States should be analogized to a private employer in California. Nor did the district court dispute that, under applicable California law, Cal. Labor Code § 3864 (West 1971), employers that provide workers' com-

---

[1]Section 1346(b) provides in pertinent part:

> [T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 provides in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

LABLE COPY

pensation are immune from third-party actions.[2] The district court ruled, however, that this court's decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), where the Court held that FECA does not itself bar third-party actions against the United States, precludes analogizing the United States to a private employer in California for purposes of determining whether third parties may recover from the United States (Pet. App. D6). The district court found petitioners 70% responsible for the accident and the agents of the United States 30% responsible, and accordingly awarded petitioners $1.2 million (Pet. App. C9).

2. The court of appeals reversed (Pet. App. B1-B9). The court first found that the United States is analogous to an employer that had complied with the California workers' compensation law since it had made payments to the Secret Service agents' survivors under FECA. It noted that a number of courts have held, after *Lockheed*, that "the United States should be entitled to the same immunity from suit enjoyed by a private employer covered by state workmen's compensation laws" (*id.* at B6). It therefore concluded that the United States is entitled to the benefits of the exclusive liability provision of Cal. Labor Code § 3864 (see note 2, *supra*), which bars third-party claims as well as direct claims (Pet. App. B6). This Court's decision in *Lockheed* does not compel a different result, the court concluded, explaining that *Lockheed* "did not confer on third-party tortfeasors

---

[2]California Labor Code § 3864 provides:

> If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.

substantive rights against the United States. The case held only that the FECA did not modify the Federal Tort Claims Act so as to bar directly third-party suits that the applicable state law would otherwise allow. See 460 U.S. at 197-99 & n.8." Pet. App. B5.

The court of appeals also concluded that, even assuming the United States is properly viewed as an out-of-state employer complying with a foreign state's workers' compensation laws rather than as a California employer, petitioners nevertheless have no substantive right to contribution. California law provides that the remedies under the laws of the foreign state are the exclusive remedies against an out-of-state employer for any injury received by nonresident employees working in California. Cal. Labor Code § 3600.5(b) (West 1971).[3] While FECA, the relevant out-of-state workers' compensation law, does not bar a third party suit, it does not provide any substantive entitlement to bring a third-party suit either, as this Court made clear in *Lockheed*. Given that petitioners had identified no substantive basis for suit, the court held that their claim was barred. Pet. App. B8.[4]

---

[3]California Labor Code § 3600.5(b) provides in pertinent part:

> Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this division while such employee is temporarily within this state doing work for his employer if such employer has furnished workmen's compensation insurance coverage under the workmen's compensation insurance or similar laws of a state other than California, so as to cover such employee's employment while in this state * * *. The benefits under the Workmen's Compensation Insurance Act or similar laws of such other state, or other remedies under such act or such laws, shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

[4]The court of appeals noted (Pet. App. B9 n.2) that it was puzzled that the district court attributed the negligence of the deceased federal driver to the United States in determining that the United States was 30

3. The court of appeals' decision is correct and is consistent with the decisions of this Court and other federal courts. Accordingly, further review is not warranted.

The court of appeals correctly concluded that the United States is properly analogized to a private employer in California that pays compensation pursuant California's workers' compensation law, since the FTCA provides that the United States is to be treated like a private employer and the United States pays workers' compensation under FECA.[5] That is a perfectly straightforward analogy that a number of courts have adopted. See *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1027 (lst Cir. 1985), cert. denied, No. 85-1253 (May 19, 1986); *Stewart* v. *United States*, 716 F.2d 755, 763 (10th Cir. 1982), cert. denied, 469 U.S. 1018 (1984); *Griffin* v. *United States*, 644 F.2d 846, 847 (10th Cir. 1981); *Roelofs* v. *United States*, 501 F.2d 87, 92 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975); *Insurance Company of North America* v. *United States*, 643 F. Supp. 465, 467-468 (M.D. Ga. 1986);

---

percent responsible for the collision, since petitioners had settled with his estate and the parties to the settlement presumably took his negligence into account in reaching their agreement. The court added that petitioners could recover based on the negligence of another federal driver who was not injured in the collision if the third-party suit were not barred. Thus, had the court of appeals not reversed the district court, it presumably would have remanded for the district court to determine the percentage of responsibility for the accident properly attributable to the United States based only on the negligence of the federal driver that was not killed in the collision.

[5]There is no merit whatever to petitioners' contention (Pet. 12-13) that the United States is not analogous to a private employer in California because it does not actually participate in the California workers' compensation program but instead pays workers' compensation under FECA. As the court of appeals noted in dismissing that argument, the FTCA "refers not to private persons under 'the same circumstances,' but to those under similar circumstances" (Pet. App. B6, quoting *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955)).

General Electric v. *United States*, 603 F. Supp. 881, 884 (D. Md. 1985), aff'd per curiam, No. 86-2041 (4th Cir. Mar. 12, 1987); *In re All Asbestos Cases*, 603 F. Supp. 599, 607-608 (D. Haw. 1984); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1127-1128 (E.D. Pa. 1984); *Giannuzzi* v. *Doninger Metal Products*, 585 F. Supp. 1306, 1309 (W.D. Pa. 1984). Petitioners do not contend that any court has held to the contrary.

Under the FTCA, the liability of the United States to third parties depends on the law of the state where the tort occurred. In the majority of states, compensation-paying employers are immune from third-party actions (see Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483, 488-489). Since California is one of those states, the United States is immune from third-party suits there.[6]

---

[6]Under FECA's exclusivity clause, 5 U.S.C. 8116(c), the United States is never liable under the FTCA to employees to whom it pays FECA benefits. Petitioners note that Congress stated in 1949, when it added Section 8116(c) to FECA, that most states provided that workers' compensation remedies were the exclusive remedies employees could obtain from their employers. S. Rep. 836, 81st Cong., 1st Sess. 23 (1949); H.R. Rep. 729, 81st Cong., 1st Sess. 14 (1949). Petitioners therefore argue (Pet. 9) that Congress must have thought that bars to suit enacted by state laws did not apply to the United States since, otherwise, it would not have needed to enact Section 8116(c). That is incorrect. First, the reports accompanying the 1949 amendments both stated that state laws "in general" barred employees from seeking recovery from employers in addition to workers' compensation (S. Rep. 836, *supra*, at 23; H.R. Rep. 729, *supra*, at 14), implying that Congress thought that some states allowed additional recoveries. Indeed, the House Report stated that Congress did not intend "to give Government employees, *or rather some of them*, the right to sue the United States, in addition to or as an alternative to the right to workmen's compensation" (H.R. Rep. 729, *supra*, at 15 (emphasis added)), suggesting that Congress recognized that the laws of most states already barred tort recoveries by federal employees who had received FECA benefits and intended that rule to apply in all states. In addition, Section 8116(c) was hardly unnecessary even if Congress thought that no state permitted

The conclusion that the United States is immune from third-party claims in California and other states where compensation-paying employers are immune is not contrary to this Court's decision in *Lockheed*. As the court of appeals explained (Pet. App. B5), the Court in *Lockheed* did not hold that FECA provided a substantive basis for bringing a third-party suit but only that it did not *bar* such suits where they were permitted. The Court expressly noted that the lower courts had concluded that "indemnity is available to Lockheed against the United States" and that the correctness of that conclusion was not before the Court (460 U.S. at 197 n.8). Here, as the court of appeals stated (Pet. App. B6), petitioners have failed to identify a substantive basis for their third-party claim. There is, therefore, no conflict between the decisions, as petitioners themselves recognize by stating that "*Lockheed* did not expressly consider the question presented here" (Pet. 7).

Nor is there any merit to petitioners' argument (Pet. 13-15) that the United States is properly analogized to an out-of-state employer under California law because the Secret Service agents were in the state on a temporary assignment and that the United States is not immune from suit as an out-of-state employer. As an initial matter, this argument depends on the peculiar facts of this case and does not warrant the Court's attention for that reason alone. Moreover, as the court of appeals concluded, it is clear that the United States is more analogous to a national employer doing business in California than it is to a private employer doing business outside California that "happens to have

---

direct tort actions by employees against compensation-paying employers, since Congress enacted Section 8116(c) to bar suits by federal employees against the United States under the Suits in Admiralty Act and the Public Vessels Act, which are not governed by state law, as well as to bar suits by federal employees against the United States under the FTCA. S. Rep. 836, *supra*, at 23; H.R. Rep. 729, *supra*, at 14.

brought in a few employees for a temporary job in-state" (Pet. App. B8), since the United States in fact employs many persons in California. Therefore, California's out-of-state employer rule is not applicable. Even if the United States is analogized to an out-of-state employer, under Labor Code § 3600.5(b) the law of the employer's "state"—here federal law—provides "the exclusive remedy against such employer for any injury" (*ibid.*), and it provides no substantive basis for this suit, as the court of appeals also noted (Pet. App. B8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1987

Supreme Court, U.S.
FILED
APR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1239

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

JOHN J. HOLLENBACK, JR.
STRAUSS NEIBAUER ANDERSON & HOLLENBACK
620 12th Street
Modesto, California 95354
(209) 526-2211

GARY V. DIXON
BARBARA E. ETKIND
ROSS, DIXON & MASBACK
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 662-2000
Of Counsel

CHARLES K. BRUNN
Counsel of Record
PHILIP W. HARVEY
BRUNN, THAYER & FLYNN
928 12th Street
Modesto, California 95353
(209) 521-2133
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases:	Page
Griffin v. United States, 644 F.2d 846 (10th Cir. 1981)	2
In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, Nos. 85-1246, 85-1253, 85-1288 (May 19, 1986)	2
In re All Asbestos Cases, 603 F. Supp. 599 (D. Hawaii 1984)	3
Insurance Company of North America v. United States, 643 F. Supp. 465 (M.D. Ga. 1986)	3
Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983)	2
Roelofs v. United States, 501 F.2d 87 (5th Cir. 1974), *cert. denied*, 423 U.S. 830 (1975)	2
Stewart v. United States, 716 F.2d 755 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018 (1984)	2
Statutes:	
5 U.S.C. § 8116(c)	3
28 U.S.C.	
§ 1346(b)	5
§ 2674	5
Cal. Lab. Code § 3864	5
Miscellaneous:	
S. Rep. No. 836, 81st Cong., 1st Sess. (1949)	3, 4
95 Cong. Rec. (1949):	
pp. 13607-13609	4
p. 13608	4
Federal Employees' Compensation Act Amendments of 1949: Hearings on H.R. 3191 Before the Special Subcomm. of the House Comm. on Education and Labor, 81st Cong., 1st Sess. (1949)	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1239

COUNTY OF MARIPOSA AND RODERIC B. SINCLAIR,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

Nothing in respondent's memorandum in opposition detracts from the force of the reasons set forth in the petition why the Court's review of the important question presented by this case is appropriate at this time.

1. Respondent does not dispute the significance of the question presented by the petition. Rather, the government attempts to portray the question whether the United States, as a third party defendant employer, is entitled to assert the exclusive remedy provision contained in a state workers' compensation statute as one that has been thoughtfully considered and consistently resolved by the lower federal courts. Respondent's own authorities (Mem. 5-6), however, belie this facile characterization. The ma-

jority of the cases cited by respondent either predate *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), involve a "statutory employer" or some other equally readily distinguishable factual situation and/or otherwise fail to address the specific question that is presented here.

Except for *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, Nos. 85-1246, 85-1253, 85-1288 (May 19, 1986),[1] all of the appellate decisions on which respondent relies predate *Lockheed*. Indeed, these cases do not even concern third-party recovery or payments under FECA. Rather, they all involve the "statutory employer" situation, in which a party not otherwise subject to a state workers' compensation statute nevertheless undertakes to guarantee compliance with the state scheme. *See Stewart v. United States*, 716 F.2d 755, 763-765 (10th Cir. 1982), *cert. denied*, 469 U.S. 1018 (1984); *Griffin v. United States*, 644 F.2d 846, 848-849 (10th Cir. 1981); *Roelofs v. United States*, 501 F.2d 87, 93-94 (5th Cir. 1974), *cert. denied*, 423 U.S. 830 (1975). Where the United States ensures payment of state workers' compensation benefits, there arguably is a basis for affording it the protection of the state's exclusive remedy provision. As the *Stewart* and *Griffin* courts acknowledged, however, "[w]hether the result would be the same if the Government contract did not require maintenance of compensation insurance is a matter for another day." 501 F.2d at 93-94; *see also* 644 F.2d at 848. Because respondent bore no responsibility for the

---

[1] As noted in the petition, *All Maine Asbestos* is distinguishable since, in that case, "[a]ll parties agree[d] with the district court" that the federal government should be analogized to a "compensation-paying private . . . employer in Maine." 772 F.2d at 1027. By contrast, petitioners here contend that the United States should be viewed as a non-California employer insured under the laws of a jurisdiction other than California.

payment of state benefits in this case, the decisions on which it relies do not advance its position.[2]

2. Respondent's analysis of the legislative history of Section 8116(c) is erroneous. As petitioners observed (Pet. 9), if Congress had intended that the federal government would be permitted to take advantage of state workers' compensation law provisions it would have had no reason to enact Section 8116(c), since Congress was well aware that workers' compensation laws, "in general, specify that the remedy therein provided shall be the exclusive remedy." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). Respondent mistakenly suggests (Mem. 6 n.6) that "Congress recognized that the laws of most states already barred tort recoveries by federal employees who had received FECA benefits and intended that rule to apply in all states." Respondent's characterization of the effect of state law, however, is contradicted by the testimony of the Acting Administrator of the agency that administered FECA prior to enactment of Section 8116(c): "At the present time, an injured employees [sic] *has the choice of suing the Government* or coming in under [FECA]." *Federal Employees' Compensation Act Amendments of 1949: Hearings on H.R. 3191 Before the Special Subcomm. of the House Comm. on Education and Labor*, 81st Cong., 1st Sess. 25 (1949) (emphasis added). The narrowness of purpose respondent attributes to Congress —simply to bar tort recoveries by federal employees who had received FECA benefits in those few jurisdictions where there was no state exclusive-remedy provision—

---

[2] Respondent also relies on several district court cases. Although the results reached in those cases support respondent's position, in several of the cases neither *Lockheed* nor Section 8116(c) of FECA apparently was even raised or, in any event, expressly addressed by the court. *See, e.g., Insurance Company of North America v. United States*, 643 F. Supp. 465 (M.D. Ga. 1986); *In re All Asbestos Cases*, 603 F. Supp. 599, 607-608 (D. Hawaii 1984).

also is inconsistent with the Senate Committee's explanation that Section 8116(c) would fill "an important gap in the present law." S. Rep. No. 836 at 23.

Moreover, respondent errs in contending (Mem. 6-7 n.7) that "Section 8116(c) was hardly unnecessary even if Congress thought that no state permitted direct tort actions by employees against compensation-paying employers, since Congress enacted Section 8116(c) to bar suits by federal employees against the United States under the Suits in Admiralty Act and the Public Vessels Act, which are not governed by state law . . . . S. Rep. 836, *supra*, at 23; H.R. Rep. 729, *supra*, at 14." In fact, Congress chose *not* to bar suits by seamen under the Suits in Admiralty and Public Vessels Act. Following issuance of the committee reports, Congress amended H.R. 3191 to exclude "a master or a member of the crew of any vessel" from FECA's exclusivity provision. *See* 95 Cong. Rec. 13607-13609 (1949).[3] Accordingly, petitioners are correct in contending that, if Congress had intended the federal government to take advantage of state exclusive remedy provisions, Section 8116(c) would have been virtually superfluous.

3. Respondent also seizes on petitioners' acknowledgment (Pet. 7) that "*Lockheed* did not expressly consider the question presented here" as grounds for opposing review by this Court. In *Lockheed*, the Court was not asked to determine whether an exclusive remedy provision con-

---

[3] Senator Morse's explanation for the amendment is instructive:

> Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the *Suits in Admiralty Act and Public Vessels Act*, and moreover, have been permitted an election to accept the benefits of the compensation in lieu of their maritime rights . . . [S]eamen for years have opposed exclusive coverage under workmen's compensation.

95 Cong. Rec. 13608 (1949) (emphasis added).

tained in a *state* workers' compensation statute could be raised as a defense by the federal government in a third-party action against it for indemnity or contribution. Notwithstanding the absence of an express resolution of this issue in *Lockheed*, it is clear that to permit respondent to raise the state law bar on the basis of an analogy drawn to payments made pursuant to FECA would effectively negate the holding in that case that payments made by the government under FECA do *not* immunize it from liability to third parties for indemnity.

Finally, respondent attempts to distinguish this case on the ground that, in *Lockheed*, the Court assumed the existence of a substantive basis for the third-party indemnity action whereas, respondent claims (Mem. 7), "petitioners have failed to identify a substantive basis for their third-party claim." To the contrary, as set forth in the petition (at 10), the cause of action asserted by petitioners—a third party action for indemnity against joint tortfeasors—is well established in California. Because the cause of action is available against a private individual, it also may be asserted against the federal government under the Federal Tort Claims Act. *See* 26 U.S.C. §§ 1346(b), 2674.

4. In sum, respondent does not dispute the importance of the question presented by the petition. Indeed, in view of the ubiquitous nature of the federal government as an employer, the widespread availability of third party relief and the existence in virtually every state of law comparable to that of Cal. Lab. Code § 3864, the significance of the issue is uncontestable. Review by the Court is appropriate for this reason alone.

Moreover, the decision below, if permitted to stand, would eviscerate this Court's decision in *Lockheed*. Intervention by the Court therefore is additionally warranted in order to avoid nullification of its prior decision.

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN J. HOLLENBACK, JR.
STRAUSS NEIBAUER ANDERSON
& HOLLENBACK
620 12th Street
Modesto, California 95354
(209) 526-2211

GARY V. DIXON
BARBARA E. ETKIND
ROSS, DIXON & MASBACK
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 662-2000
Of Counsel

CHARLES K. BRUNN
Counsel of Record
PHILIP W. HARVEY
BRUNN, THAYER & FLYNN
928 12th Street
Modesto, California 95353
(209) 521-2133
Counsel for Petitioners

April 1987